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BOARD REAFFIRMS 2004 RULING THAT NLRA PROHIBITS GRANTING MAKE-WHOLE REMEDY TO EMPLOYEES DISCHARGED FOR MISCONDUCT DISCOVERED BY EMPLOYER'S HIDDEN CAMERAS

In *Anheuser-Busch, Inc.,* 351 NLRB No. 40, the Board, by a 3-2 vote, reaffirmed its 2004 holding that the National Labor Relations Act prohibits the Board from granting a make-whole remedy to employees disciplined or discharged for misconduct discovered as a result of unlawful conduct by their employer.

Without bargaining with the union that represents the employees at its St. Louis facility, Anheuser-Busch installed hidden surveillance videocameras. Through use of the cameras, Anheuser-Busch learned that certain employees were engaged in misconduct, and it disciplined or discharged 16 of them.

In its initial decision, the Board found the installation and use of the cameras to be an unlawful unilateral change, and it issued a cease-and-desist order against Anheuser-Busch. But by a 2-1 decision, the Board declined to order reinstatement or backpay for the employees. The Board held that it lacked authority to order reinstatement or backpay because the employees were disciplined for cause, regardless of the fact that their employer learned of their misconduct only as a result of its own unfair labor practice. On petition for review to the United States Court of Appeals for the District of Columbia Circuit, the court affirmed the Board's unfair labor practice finding, but found that the Board had not adequately reconciled with existing caselaw its decision to withhold a reinstatement and backpay remedy from the employees.

On remand, the Board majority (Chairman Battista and Members Schaumber and Kirsanow) reviewed the NLRA and its legislative history and determined that the statute and compelling policy considerations bar the Board from granting a remedy to employees who have been disciplined or discharged for cause. In particular, the majority was guided by the principle that employees should not benefit from their misconduct through a windfall award of reinstatement and backpay. The Board overruled cases previously identified by the court as inconsistent with that holding.

In dissent, Members Liebman and Walsh stated that the court's decision precluded the Board from deciding this case on purely statutory grounds. In their view, neither the statutory language relied on by the majority nor the legislative history addresses the issue presented. The dissenters stated that a make-whole remedy for the employees is necessary to repair the damage that Anheuser-Busch's unlawful unilateral changes caused to the union's status as the employees' bargaining representative and to deter future unlawful unilateral changes.

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